BUMIPUTRA-COMMERCE BANK BHD

v.

LIEW WEE CHIN

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[CIVIL APPEAL NO: 12-47-2002-II]
14 MAY 2004

CIVIL PROCEDURE: *Service - Irregularity in service - Summons and statement of claim - No proper indorsement on summons - Signature of process server on indorsement section of summons different from signature on affidavit of service - Defendant out of jurisdiction at material time - Whether service of summons properly effected*

The defendant had successfully applied in the Sessions Court to set aside the service of the plaintiff's summons and statement of claim. The plaintiff appealed to the High Court. The evidence on record before the High Court revealed that: (i) the summons was posted by way of AR registered post to the defendant's last known address; (ii) the affidavit of service did not comply with para 3 of Form 9 as referred to in O. 7 r. 7 SCR; (iii) the signature of the process server on the Indorsement of Service section of the summons and the signature of the process server on the Affidavit of Service were completely different; (iv) the defendant was out of jurisdiction at the material time; and (v) the wife of the defendant had received the registered letter but did not bring it to the defendant's attention as they had serious matrimonial problems and were not on talking terms.

Held (dismissing the plaintiff's appeal with costs):

[1] Even though the service of the summons and statement of claim could have been effected by AR registered post addressed to the last known address by virtue of O. 7 r. 1(1) of the SCR, such service was irregular since the defendant had rebutted the deeming provision (s. 12 Interpretation Acts 1948 & 1967) by proving that he did not receive due notice of it by virtue of the fact that he was out of the jurisdiction. The High Court could not on the facts of the case categorically say that the service of the summons had been properly effected upon the defendant. (p 54 a-d)

Case(s) referred to:
Tuan Hj Ahmad Abdul Rahman v. Arab Malaysia Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
Interpretations Act 1948 and 1967, s. 12
Subordinate Courts Rules 1980, O. 7 rr. 1(1), 7

Reported by Andrew Christopher Simon

JUDGMENT

Lau Bee Lan JC:
This is an appeal made pursuant to O. 49 r. 6 of the Subordinate Courts Rules 1980 ("the SCR") against the decision of the learned sessions court judge given on 8 November 2002 who had decided in favour of the defendant in respect of the latter's application. The defendant's application was essentially for:

(a) leave to enter conditional appearance for the purpose of setting aside service of summons;

(b) the purported service of the summons and statement of claim or notice of the summons on the defendant be set iside and or;

(c) all consequential proceedings and judgment be set aside.

The defendant's application is supported by:

(a) Defendant's affidavit in support of Liew Wee Chin affirmed on 10 September 2002 ("defendant's affidavit I")';

(b) Defendant's affidavit in reply of Geraldine Kho affirmed on 8 October 2002 ("defendant's affidavit II"); and

(c) Defendant's affidavit in reply of Geraldine Kho affirmed on 24 October 2002 ("defendant's affidavit III").

The plaintiff opposed the defendant's application *vide*:

(a) Plaintiffs affidavit in opposition of Audrey Sabrina Linang affirmed on 3 October 2002 ("plaintiffs affidavit I");

(b) Plaintiffs affidavit in opposition II of Audrey Sabrina Linang affirmed on 21 October 2002 ("plaintiffs affidavit II"); and

(c) Plaintiffs affidavit of service of Asehari Bin Buang affirmed on 19 November 1998 ("plaintiffs affidavit III").

The court has considered the pleadings, the various affidavits and the submissions of both the learned counsel, Albert Litor for the plaintiff and Shankar Ram for the defendant. The court's findings and evaluation include the following.

(1) The main issue before the court is whether the plaintiffs writ of summons and statement of claim had been properly served on the defendant.

(2) Whilst the plaintiff contends that service was regular, the defendant alleges otherwise. The defendant alleges that he is entitled to have the judgment set aside *ex debito justitiae* because the plaintiff had failed to comply with O. 7 r. 5 and O. 7 r. 7 of the SCR for the following reasons:

(a) the affidavit of service did not comply with para. 3 of form 9 referred to in O. 7 r. 7 to the following effect "That I did on the .... day of ..., 19 ... **indorse on the said summons the day of the month and the week of the said service**". (Emphasis added)

(b) The signature on the "indorsement of service" section of the summons (form 7) and the signature on the affidavit of service are completely different.

This is indeed quite apparent especially since the 'indorsement of service' portion of the summons does not disclose the identity of the process server as no names were mentioned, save for a signature. I do note that In Form 7 referred to in O. 7 r. 5 of the SCR it is stated as "(signed)" but surely, when the person who serves the Summons signs, the name would have to be identified. In my view, even if the said person signed and had omitted to state his name in full,yet the situation would have been saved by the "indorsement of service" as stipulated by para. 3 in Form 9, in the sense that the particulars of the said person would appear as required in para. 1 of the said form under "(name, address and description of deponent)".

In the instant case, not only is the name of the person who served the summons absent in the "indorsement of service" part of the summons (exh. LWC2) save for the words "process server", the "indorsement of service" as required in para. 3 of form 9 has not been

complied with and coupled with the fact that the two signatures are *prima facie* different.

The court notes that the defendant has produced exh. LCW4, a photocopy of his passport which if perused in particular p. 48 of the ROA, it certainly showed that [on or about 7 November 1998] he was out of jurisdiction.

In the light of such evidence, to my mind, therefore, service of the said summons in question by way of personal service is irregular.

(3) The court takes cognisance of the fact that the plaintiff did send the summons by way of AR Registered post to the defendant's last known address *vide* letter dated 10 June 1998 and the AR Registered return card and the acknowledgment receipt have been exhibited as exhs. 5 ASL1 and ASL2

Based on the evidence of Geraldine Kho, the estranged wife of the defendant, she received the said letter but however did not bring it to the attention of the defendant as they had serious matrimonial problems then and were not on talking terms, (para 4 of defendant's affidavit III).

I am also mindful of the provision of s. 12 of the Interpretations Act 1948 and 1967 as submitted by learned counsel for the plaintiff which reads:

12. Where a written law authorises or requires a document to be served by post, then; **until the contrary is proved**, service:

(a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document;

and

(b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post. (Emphasis added).

Although s. 12 is a deeming provision, in the circumstances of the present case, the defendant to my mind has discharged his burden of proving to the contrary by adducing evidence that he was out of jurisdiction as at the date "when the letter would have been delivered in the ordinary course the post" ie, on 20 June 1998. This can be verified by viewing the stamped endorsements of the defendant's

passport, exh. LCW4, specifically at p. 43 (p. 48 of the ROA) where the dates 2 April 1998, 23 June 1998, 30 June 1998 and 28 July 1998 appear.

Therefore, even though the service of the writ of summons and statement of claim may be effected by AR Registered post addressed to the last known address by virtue of O. 7 r. 1(1) of the SCR, but the service is irregular since the defendant has rebutted the deeming provision by proving that he has not received due notice of it by virtue of the fact that he was out of jurisdiction.

(4) The purpose of proper service of a writ of summons and the statement of claim is to enable the defendant to answer the claim made against him. Under the circumstances, I am of the opinion that I cannot on the facts of the case categorically say that service of the summons has been properly effected on the defendant. In *Tuan Hj Ahmad Abdul Rahman v. Arab Malaysia Finance Bhd* [1996] 1 CLJ 241 the Federal Court speaking though his Lordship Edgar Joseph FCJ stated:

> The general rule is that when it is clearly demonstrated to the satisfaction of the Court that, a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms.

Following the ratio of the aforesaid Federal Court authority, since I have found the service of the writ of summons and the statement of claim to be irregular, I am bound to set aside the judgment *ex debito justitiae* without any need to consider the merits of the case further. I therefore disallow the plaintiffs appeal with costs to be taxed unless otherwise agreed.